Filed 11/2/10 In re M.V. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re M.V. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. JACOB V., Defendant and Appellant.	G043757 (Super. Ct. No. DP016012 & DP016013) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Caryl Lee, Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * *

INTRODUCTION

Jacob V. (Father) is the father of dependent children M.V. (now age 16) and R.V. (now age 11) (collectively, the Children). Father appeals from the order denying his petition under Welfare and Institutions Code section 388 (all further code references are to the Welfare and Institutions Code). Father's petition alleged a change of circumstance or new evidence since the hearing under section 366.26, at which the juvenile court selected legal guardianship as the permanent placement plan and reduced Father's visitation rights.[1]

We conclude the juvenile court did not abuse its discretion by denying Father's section 388 petition without an evidentiary hearing because Father did not make a prima facie showing of a genuine change of circumstance or new evidence. Accordingly, we affirm.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

I. *Facts and Procedural History Through the Section 366.26 Order*

The facts and procedural history through the section 366.26 order were recited in our opinion in *In re M.V.*, *supra*, G042662 as follows:

"The Children were placed in protective custody in September 2007 after M.V. told a school counselor and a social worker that Father sexually abused her, drank heavily, and drove drunk with the Children in the car. The juvenile dependency petition, filed in September 2007, asserted failure to protect (§ 300, subd. (b) [count 1]) and sexual abuse (§ 300, subd. (d) [count 2]). Count 1 alleged Father sexually abused and molested M.V. on several occasions, Father had an unresolved alcohol problem, the Children lived

[1] In an earlier appeal, Father challenged the reduction in his visitation rights. In *In re M.V.* (Mar. 9, 2010, G042662) (nonpub. opn.), we affirmed, concluding Father forfeited his challenge to the visitation order.

in unsanitary conditions, and, before March 2007, the Children were exposed to acts of domestic violence.

"Mother, who is not a party to this appeal, has been incarcerated since March 2007 and has an expected release date in September 2011.

"In November 2007, the juvenile court declared the Children dependent children of the court under section 360, subdivision (d) after sustaining the allegations of count 1. The court dismissed count 2. The court removed the Children from parental custody and ordered reunification services. Father's case plan required him to participate in a domestic violence program, sexual abuse counseling for perpetrators, parenting education, substance abuse treatment, and a 12-step program.

"Shortly after being detained, the Children were placed in the home of their maternal grandmother, where they remain. Once the Children settled into a routine, they fought with each other less and followed their maternal grandmother's directions with less defiance. Over time, the Children adjusted well to living with their maternal grandmother and excelled academically, socially, and emotionally.

"Father had monitored visitation with the Children throughout the dependency period. He initially was given four hours per week of monitored visitation. It was reported that Father consistently attended the monitored visits, but often arrived late. He acted appropriately, and the visits went well. In March 2008, the Orange County Social Services Agency (SSA) increased his visitation time to four hours, twice a week. Father's visits with the Children were characterized as 'friendly, affectionate, and with appropriate interactions.'

"Father participated in much of his case plan, including anger management, parenting classes, and sexual abuse perpetrator counseling. However, by May 2008, he still had not enrolled in a substance abuse program and was unwilling to acknowledge the need to address his problems with alcohol. In June and July 2008, he missed seven of 13 scheduled drug tests. Father was arrested for driving under the influence of alcohol in

December 2007 and convicted in June 2008, but did not inform SSA of his arrest and conviction until December 2008.

"In May 2009, at the contested 18-month review hearing, the juvenile court terminated reunification services and set a section 366.26 hearing. The court described as 'moderate' the progress made toward alleviating or mitigating the causes for detention. The court authorized continuation of conjoint therapy and maintained Father's visitation rights of four hours, twice a week.

"By September 2009, Father had participated in 18 sessions of conjoint therapy with M.V. and 24 sessions of conjoint therapy with R.V. Father behaved appropriately in these sessions and made progress toward reaching treatment goals. M.V. told the therapist she felt safe in the sessions, and R.V. appeared genuinely happy to see Father.

"SSA's section 366.26 report, dated September 17, 2009, recommended guardianship as the permanent placement plan and that Father have an eight-hour monitored visit every other week. The report stated: '[The Children] eagerly await their mother's release with the hope that she can work on getting them back, so they can live together. The children report that they enjoy visiting their parents, but they would like to enjoy weekend activities with their friends. Although they enjoy their visits with their father and paternal grandmother, both children report that they find it difficult to talk with their father about the visit times.' The report also explained: 'Although the father . . . has maintained regular visits with the children, once the contract for the [SSA] provided monitoring ended there was an increase in arguments and disputes over visitation times, frequency, and acknowledging the desires of the children to participate in age[-]appropriate activities with their friends. The father appeared unwilling or unable to address the issues that brought the children to the attention of the [SSA].'

"An addendum report noted: '[The maternal grandmother] has been an advocate for the children's ability to participate in normal school and peer functions with

the rest of their friends. [The maternal grandmother] has understood the need for regular visits with the father and mother; however, she points out, that with the exception of June 2009, the kids have been attending school during the week, counseling sessions during the week nights, and attending weekend visits for over one and a half years now. "They haven't had the chance to be kids."'

"Father did not appear at the section 366.26 hearing on September 17, 2009 despite being ordered to do so. His counsel submitted on his behalf. After receiving SSA's section 366.26 report and addendum report, the juvenile court found that termination of parental rights and adoption were not in the Children's best interests, ordered guardianship as the plan of permanent placement, and appointed the maternal grandmother as legal guardian. The court approved SSA's visitation plan and incorporated it into the order."

II. *Facts and Procedural History After the Section 366.26 Order*

A status review report, dated March 16, 2010, stated, "the children continue to thrive under the supervision of their guardian, [the maternal grandmother], who provides a safe, nurturing, supportive and loving home, facilitating ongoing visits between the children, their parents and their paternal relatives." The report quoted a letter from a therapist to the social worker, stating that Father and M.V. had attended 23 sessions of conjoint therapy between February and November 2009 and Father "appeared to have behaved appropriately."

The report explained the Children visit their mother about once a month at the conservation camp where she is incarcerated. The maternal grandmother reported the Children "enjoy spending the day with their mother and look forward to their monthly visits." The Children visit Father two to four days per month. The March 16, 2010 report stated the Children "are happy with the visit schedule as it is now."

Father filed his section 388 petition in April 2010. He requested the court to terminate guardianship and return the Children to his custody, to return the Children to him for a 60-day trial return, or to change his visitation to liberalized unmonitored visits. He alleged as changed circumstances: (1) he and M.V. had completed conjoint therapy and "the therapist reports in her termination letter that there was positive progress on the goals regarding supportive bonds"; and (2) he has "dealt with his warrant and is compliant with the terms of his probation."

In a declaration submitted with the petition, Father stated he worked two jobs and earned enough to support a family. He reported having completed parenting classes and anger management classes in December 2008, sexual abuse counseling in November 2008, and a 90-day substance abuse program in April 2009. He claimed his drug tests had been negative and he was committed to remaining sober and focusing on his children. Father stated that during conjoint therapy, he had made amends with the Children, accepted responsibility for his actions, communicated with the Children, and learned appropriate boundaries.

Father also declared: "I believe it is in the best interest of the children to be returned to my care because they have stated to me several times that their legal guardian falls down frequently throughout the week and passes out on the couch due to her medication. This causes the children emotional distress and anxiety over their grandmother's health and safety as well as their own safety. While the children were in my care prior to SSA involvement, I have also witnessed grandmother passing out due to her strong medication for her various pains and ailments."

An addendum SSA report, dated April 26, 2010, responded to Father's section 388 petition. In the report, the social worker noted that, while Father stated he had two jobs, he had not provided proof of employment or proof of income. The social worker confirmed that Father had completed parenting and anger management classes and sexual abuse counseling. But the social worker explained the 90-day substance abuse

program Father claimed to have completed was a court-ordered first offender alcohol program for his driving under the influence of alcohol arrest and conviction. That program was not approved by SSA and did not address family problems or history of substance abuse. The social worker disagreed with Father's assertion that his drug tests had been negative, explaining that between May 2007 and May 2009, Father missed 22 out of 98 drug tests.

The social worker explained that Father had not completed conjoint therapy and referred to the therapist's letter copied in the March 16, 2010 report. The therapist had reported that Father and M.V. had attended 23 conjoint therapy sessions, which were temporarily suspended because M.V. needed a break from therapy. The therapist had concluded that additional work was needed on two treatment goals.

The social worker stated the maternal grandmother suffers from spinal myelopathy for which she takes pain medication. The social worker reported: "The undersigned was assigned the case in December 2007. The undersigned has visited the caretaker, [the maternal grandmother], on a monthly basis. The visits have taken place in the home during early morning hours, throughout the day, during late evening hours as late as 9:00 p.m. In addition, the undersigned has met the guardian at school appointments at the children's therapy locations, and in Court. [¶] Although, sometimes tired, [the maternal grandmother], age 61 years, has never appeared to the undersigned that she was physically or mentally compromised as a result of her disability or as a result of being overmedicated. [¶] . . . [¶] [The maternal grandmother] says that she gets up around 5:00 a.m. to get the children ready for school, prepares their breakfast, gets their clean clothes ready, walks, or rides in her motorized scooter with R[.V.] to school, then she returns home, cleans the home, shops for groceries, and provides for all the needs of the children, physically, mentally, emotionally and educationally. [¶] The undersigned has no concerns about the ability of [the maternal grandmother] to provide for the best

interests of the children, and provide and maintain a safe supportive and loving home for the children."

The social worker recommended denying Father's section 388 petition with no change in the monitored visitation plan.

The juvenile court summarily denied Father's section 388 petition. The court found that the claimed changed circumstance took place before the section 366.26 order, except for the conjoint therapy sessions in October 2009. The court concluded, "[t]here is simply not sufficient facts that are alleged within this petition that would justify the court changing the order, and that would apply as well to the request for the change in the visitation order."

DISCUSSION

Section 388, subdivision (a) allows a person having an interest in a dependent child of the juvenile court to petition the court for a hearing to change, modify, or set aside any previous order on the grounds of change of circumstance or new evidence. The petition must be verified and "shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction" (*Ibid.*)

"The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.] We review the juvenile court's summary denial of a section 388

petition for abuse of discretion. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Father failed to make a prima facie showing to justify a hearing. His allegation that he and M.V. had completed conjoint therapy did not support a claim of changed circumstance. His declaration in support of the petition stated the last conjoint therapy session was on November 30, 2009. The SSA status review report, dated March 16, 2010, reports that, according to the therapist, conjoint therapy was not completed but temporarily suspended because M.V. "need[ed] a break from therapy." The addendum report, dated September 17, 2009, provided the therapist's assessment of Father' progress after 18 therapy sessions. The therapist concluded Father had made positive progress on four of five goals and behaved appropriately. The status review report, dated March 16, 2010, included the therapist's assessment of Father' progress after an additional five therapy sessions, and that assessment was the same as that in the addendum report dated September 17, 2009. Thus, Father's completion of five more therapy sessions after the section 366.26 order did not present a genuine changed circumstance or new evidence.

Father also participated in conjoint therapy with R.V., and, at the time of the section 366.26 hearing, had attended 24 sessions. The SSA addendum report, dated September 17, 2009, copied a letter from the therapist, explaining that Father had made progress in meeting his goal of making amends to R.V. and had taken responsibility for the wrongs Father committed in the past. Only one more conjoint therapy session was conducted after the section 366.26 hearing before the therapist took a leave of absence. The SSA addendum report, dated April 15, 2010, copied a letter from the therapist, stating Father and R.V. "were able to meet their goals" and reporting that Father had made amends to R.V. on more than one occasion. Thus, the court had before it at the time of the section 366.26 hearing an assessment of Father's progress in conjoint therapy

with R.V. The single additional therapy session after the hearing, with the same positive assessment of Father's progress, does not constitute a genuine changed circumstance.

Father also alleged he had "dealt with his warrant" and was "compliant with the terms of his probation." As for the warrant, at the section 366.26 hearing, counsel for SSA stated she had been informed by the social worker that a warrant for Father's arrest was outstanding. As of April 2010, Father did not appear to have outstanding warrants. In the section 388 petition, Father does not explain what he means by having "dealt with" the warrant and he provided no explanation in his declaration attached to the petition. Father's probation had been revoked on July 25 and October 31, 2008, and on March 3, April 30, August 7, and November 3, 2009. Accepting as true Father's allegation he was in compliance with his probation as of April 2010, that fact alone would not justify changing the section 366.26 order in light of the risk his probation might be revoked in the future. Thus, no hearing on that allegation was necessary.

Father's completion of parenting and anger management classes in December 2008, sexual abuse counseling in November 2008, and the court-ordered first offender alcohol program in April 2009 did not constitute changes in circumstance or new evidence as all occurred before the section 366.26 hearing.

Father did not allege the maternal grandmother's medical condition as a changed circumstance or new evidence. Instead, he raised it in his declaration as supporting his claim that returning the Children to his care would be in their best interest. In any event, the maternal grandmother's medical condition was not a change of circumstance or new evidence. SSA's section 366.26 report, dated September 17, 2009, reported the maternal grandmother had been diagnosed with spinal myelopathy and listed her medications. In his declaration attached to the petition, Father declared that before the initiation of the dependency petition, he saw the maternal grandmother pass out due to her medication.

Because Father failed to make a prima facie showing of a genuine change of circumstance or new evidence, the juvenile court did not abuse its discretion by denying his section 388 petition without an evidentiary hearing.

DISPOSITION

The order denying Father's section 388 petition is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.